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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 297

THE ARUNDEL CORPORATION,

Petitioner,

vs.

THE UNITED STATES,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE
COURT OF CLAIMS

WILLIAM S. HAMMERS,
Counsel for Petitioner.



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**PETITION FOR A WRIT OF CERTIORARI TO THE
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*To the Honorable, the Chief Justice and the Associate
Justices of the Supreme Court of the United States:*

Your petitioner, The Arundel Corporation, by William S. Hammers, its counsel, prays that a writ of certiorari issue to review the judgment of the Court of Claims entered in the above-entitled case on May 7, 1945.

Opinions Below

The opinions of the Court of Claims (R. 58-64) are not yet officially reported.

Jurisdiction

The judgment of the Court of Claims was entered on May 7, 1945 (R. 64). The jurisdiction of this Court is in-

voked under Section 3 (b) of the Act of February 13, 1925, c. 229, 43 Stat. 936, 939, as amended by the Act of May 22, 1939, c. 140, 53 Stat. part 2, 752.

Contract Provision Involved

There is involved in this case the meaning and application of the following provision in the standard form of Government construction contract:

“Article 4. *Changed conditions.*—Should the contractor encounter, or the Government discover, during the progress of the work subsurface and/or latent conditions at the site materially differing from those shown on the drawings or indicated in the specifications, or unknown conditions of an unusual nature differing materially from those ordinarily encountered and generally recognized as inhering in work of the character provided for in the plans and specifications, the attention of the contracting officer shall be called immediately to such conditions before they are disturbed. The contracting officer shall thereupon promptly investigate the conditions, and if he finds that they do so materially differ the contract shall, with the written approval of the head of the department or his duly authorized representative, be modified to provide for any increase or decrease of cost and/or difference in time resulting from such conditions.”

Questions Presented

1. Whether Article 4 of the standard form of government construction contract (herein covering an underwater dredging project) obligates the United States to make an equitable adjustment of the contract to provide for the increase of cost of performing the work where, unknown to either of the parties at the time the contract was entered into and signed, there existed at the site subsurface conditions materially differing from those shown on the draw-

ings and indicated in the specifications with respect to the quantity of pay yardage excavation on which the bids were solicited and the contract price based.

2. Whether the subsurface conditions, referred to and contemplated by the first part of Article 4 of the contract, comprehend only differences in the character of the materials or structures necessitating substantial variation and change in the plans and specifications, or include other physical conditions such as a material difference in quantity from that indicated on the contract drawings and stated in the specifications.

3. Whether Article 4 of the contract obligates the United States to compensate the contractor for the increase of cost of performing the work required where it is represented in the specifications that the proposed work is not exposed to storm action and a substantial change in the physical conditions from those shown on the drawings and indicated in the specifications is caused by a hurricane.

4. Whether that part of Article 4 of the contract which refers to the encountering, or discovery, during the progress of the work, of "unknown conditions of an unusual nature differing materially from those ordinarily encountered and generally recognized as inhering in work of the character provided for in the plans and specifications," contemplates only unknown subsurface conditions existing at the time the plans and specifications were prepared, or embraces other contingencies of unusual nature which change the physical conditions materially from those shown on the plans or indicated in the specifications.

5. Whether the United States is liable in damages to petitioner for its failure and refusal to modify the contract unit price pursuant to the covenant in Article 4 of

the agreement to provide for the increase of cost resulting from the changed conditions encountered.

Statement

This is a suit arising under and growing out of a unit price contract between petitioner and respondent for dredging in the Cape Cod Canal, Massachusetts.

Petitioner seeks to recover \$34,550.88, the increase in cost of performing the work due to the fact that the sub-surface conditions encountered were found to be grossly in variance with the plans and specifications on which bids were solicited and the contract price based.

The action is predicated on the failure and refusal of the contracting officer and head of the department to modify the contract unit price pursuant to the covenant in Article 4 of the agreement, said article being hereinabove set out.

The special findings of fact by the Court of Claims (R. 41-58) present a complete history of the claim.

On August 4, 1938, the War Department, through the United States Engineer Office at Boston, Massachusetts, issued specifications for certain dredging to be done in the Cape Cod Canal, and invited the submission of sealed bids, to be opened August 24, 1938, for performing the work.

The work to be done was shown on drawings described in paragraph 1-03 of the specifications, and was divided into two separate areas designated as Section A and Section B.

The work in Section A, which is the area herein involved, consisted of dredging on the north side of the Canal to a depth of 32 feet below mean low water over a bottom width of 100 feet from Station 110 to Station 375, a distance of about 26,500 feet. The work in Section B consisted of dredging on the south side of the Canal to the same depth and between the same stations as Section A over a bottom width of 65 feet.

The specifications stated that, owing to the rapid currents, the material in the dredged cuts is eroded when it is disturbed by the process of dredging; that during the progress of recent contracts the prescribed cuts had been secured by the contractor after the dredging of about 75 per cent of the estimated quantity of material in the cut, scow measurement, including overdepth; and that the quantities given therein as the total estimated quantities of material necessary to be removed from within the specified limits were not the actual quantities lying therein but the *estimated pay yardages*, and were the quantities that would be used as a basis for canvassing bids and for determining the amount of the consideration of the contract (R. 44-45).

The total estimated quantity of material necessary to be removed within the specified limits of Section A was stated to be 2,423,000 cubic yards, scow measurement, the maximum amount of allowable overdepth dredging 471,500 cubic yards, scow measurement, and the two amounts totaling 2,894,500 cubic yards, scow measurement, the basis for bids (R. 43-44).

Petitioner's bid for the work in Section A was 34.73 cents per cubic yard, scow measurement. It was the low bid. However, after the bids were opened on August 24, 1938, the district engineer at Boston took the position that the bid was excessive in comparison with the Government estimate of cost which was 30.9 cents per cubic yard, and after some negotiations between the parties the district engineer offered to award the contract to petitioner at 34 cents per cubic yard, to which petitioner replied on September 10, 1938, as follows: "Confirming telephone conversations, we will accept the award of contract covering the performance of 2,894,500 cubic yards of material, scow measurement, to be removed from Section A * * * at a unit price of

Thirty-four cents (\$0.34) per cubic yard, scow measurement * * * (R. 42).

On the basis above stated, a contract for the work was entered into and signed by the parties on October 6, 1938 (R. 43).

Petitioner commenced operations at Station 368 near the westerly or Buzzards Bay end of the project on November 29, 1938, and completed the work on June 12, 1940 (R. 43, 54).

In October and November 1938 respondent caused certain predredging surveys to be made in the area to be dredged under the contract. Upon completion of said surveys, respondent estimated that the material to be dredged under the contract would be 2,468,550 cubic yards instead of 2,894,500 yards, pay yardage, as set out in the specifications, a reduction of 425,950 cubic yards, and found that the greatest reduction occurred at the easterly or Cape Cod Bay end of the project between stations 110 and 190 where it amounted to approximately 317,000 cubic yards. The new computations were completed and tabulated during December 1938 and were furnished to petitioner in the early part of January 1939 (R. 49-50).

The surveys on which the specifications and contract drawings were based had been made about June 1938 (R. 66).

The change in physical conditions from those shown on the contract drawings and indicated in the specifications was attributed to a hurricane that occurred along the New England coast on September 21, 1938, about two weeks before the contract was entered into on October 6, 1938. It was found that the unusually strong currents created by the hurricane (10 to 12 miles per hour as compared with the maximum velocity of the normal tidal currents of 4 miles per hour) had removed a substantial amount of material from the area to be dredged, as above indicated, al-

though neither party was aware of the change in conditions at the time the contract was entered into, nor until after the new surveys mentioned had been made and the dredging operations started (R. 45).

The specifications stated that "The proposed work is located within the land section of the Cape Cod Canal and is not exposed to storm action (R. 22).

Upon receipt of the information in regard to the changed conditions, petitioner on January 16, 1939, requested that respondent modify the contract, pursuant to Article 4 thereof, and increase the unit price to provide for the increase of cost of performing the work (R. 50).

Petitioner asked that the unit price be increased from 34 cents to 35.96 cents per cubic yard for all pay yardage dredged under the contract (R. 55). The method employed by petitioner in determining its estimated unit cost is, in general, the same as that employed by respondent in computing the estimated cost of a given job (R. 55).

It was stated in support of the request for a modification of the unit price that the loss of the more easily dredgeable material between stations 110 and 190, lowering of bank necessitating 30% greater dredge advance per scow load of dredging, and increased average distance to the dumping ground would cause a drop in rate of production equivalent to a 3.5% reduced output for the entire job (R. 51).

The request was denied, the basic reason assigned therefor being that no provision is made in the contract by which a reduction in yardage affords the contractor grounds for claiming an increase in the contract price (R. 53).

Upon completion of the work, this suit was instituted in the Court of Claims. In the petition, petitioner asked for recovery of \$39,565.60 based upon the above mentioned increase in unit price of 1.96 cents per cubic yard as applied to a total of 2,018,653 cubic yards of material dredged and removed. In the evidence offered in support of the

claim, petitioner revised its original estimated increase in unit price from 1.96 cents to 1.73 cents per cubic yard, based on the actual wind-up details of the job, and the amount sought to be recovered to \$34,550.88, based upon an application of the 1.73 cents per yard to 1,997,161 cubic yards, the total number of cubic yards for which payment was received under the contract (R. 55).

The court below found that the average estimated monthly rate of production as computed by petitioner in its original job estimate was 133,000 cubic yards, and in carrying out the work the average monthly rate of production was 127,950 cubic yards, a reduction of 3.8% (R. 57). It also found that, on the basis that had the actual yardage and the time required for its removal been known when the bid was submitted, a higher bid, 35.73 cents per cubic yard, would have been submitted; and that an application of the increase in bid price of 1.73 cents per cubic yard to the total yardage removed and paid for, namely, 1,997,161 cubic yards, makes an amount of \$34,550.88, the amount of recovery herein sought (R. 57).

The court below concluded, however, as a matter of law, one judge writing a dissenting opinion, that petitioner was not entitled to recover and dismissed the petition entering judgment accordingly.

Specification of Errors to Be Urged

The Court of Claims erred :

1. In holding that respondent, by the contract, only bound itself to make an equitable adjustment of the contract price if materials, structures, or obstacles of a substantially different *character* from those described in the specifications were encountered.

2. In holding that the subsurface or latent conditions materially differing from those shown or indicated in the con-

tract, referred to and contemplated by the first part of Article 4 of the contract, were subsurface or hidden conditions which actually existed but were unknown by either party at the time the specifications and drawings were prepared and at the time the bid was submitted and accepted, and because of which unknown conditions the representation or indication in the plans and specifications would have to be substantially varied or changed in order for respondent to obtain the completed work as called for and intended by the contract.

3. In holding that the second part of Article 4 of the contract contemplated only unknown *subsurface* conditions of an unusual nature and differing materially from those ordinarily encountered and generally recognized as inhering in the character of work called for, even though no representation had been made or indication given with reference thereto in the specifications or on the drawings.

4. In failing to hold that the changed conditions caused by the hurricane of September 21, 1938, were unknown conditions of an unusual nature differing materially from those ordinarily encountered and generally recognized as inhering in work of the character provided for in the plans and specifications, such as contemplated by Article 4 of the contract, calling for an equitable adjustment of the contract unit price.

5. In not holding that petitioner was entitled to damages by reason of the failure of the respondent to modify the contract unit price pursuant to the covenant in Article 4 of the contract.

6. In failing to render judgment in favor of petitioner in the sum of \$34,550.88.

7. In holding that petitioner was not entitled to recover, and dismissing the petition.

Reasons for Granting the Writ

Petitioner respectfully represents, as reasons for the granting of the writ, that the Court of Claims has decided important questions of Federal law which have not been, but should be, settled by this Honorable Court; that the questions involved are of great public interest affecting thousands of contractors; that said questions have been decided in a way probably in conflict with applicable decisions of this Court; and that said Court, in determining the questions, has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of the power of supervision of this Court.

It is a matter of common knowledge that the Government annually enters into a vast number of contracts using the standard form in which is incorporated Article 4, above quoted, relative to "Changed conditions," and this Court, in *United States v. Callahan Walker Construction Co.*, 317 U. S. 56, recognized the necessity for an authoritative determination of the meaning and application of the terms of said form of contract by taking under consideration and reviewing a decision of the Court of Claims involving articles 3 and 15 thereof.

The conflict of views in the opinions delivered in this case serves to emphasize the necessity and desirability of an authoritative determination of the meaning and application of the covenant contained in the aforesaid Article 4 of the standard form of contract here involved.

It was stated by the Court of Claims in the case of *Hirsch v. United States*, 94 C. Cls. 602, that one of the purposes of article 4 was to relieve bidders of the necessity of having to increase their bid prices so as to take care of all possible unknown and unforeseen conditions and contingencies that might arise in connection with furnishing respondent a perfect job at their own expense; and Judge Madden, in

the dissenting opinion in this case, says the purpose of the article is to induce bidders not to increase their bids because of fear of unknown impediments to profitable performance. And this Court, in *United States v. Rice*, 317 U. S. 61, referring to articles 3 and 4 of the standard form of contract, stated that both clauses deal with changes made necessary by new plans or new discoveries made subsequent to the signing of the contract. It is important, therefore, to the Government as well as to the petitioner and others interested in government contract work that the questions of law herein involved be authoritatively decided by this Honorable Court.

Conclusion

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be granted.

WILLIAM S. HAMMERS,
Counsel for Petitioner,
505 Union Trust Bldg.,
Washington, D. C.

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